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No. 06-970

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IN THE

Supreme Court of the United States

SENATOR JOHN MCCAIN, REPRESENTATIVE TAMMY BALDWIN, REPRESENTATIVE CHRISTOPHER SHAYS, AND REPRESENTATIVE MARTIN MEEHAN,

Appellants,

v.

WISCONSIN RIGHT TO LIFE, INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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QUESTION PRESENTED

Whether Section 203 of the Bipartisan Campaign Reform Act, 2 U.S.C. § 441b, which prohibits a corporation or labor union from using general treasury funds to finance "electioneering communications," is constitutional as applied to prevent appellee from using general treasury funds to finance three advertisements it sought to broadcast before the 2004 election.

PARTIES TO THE PROCEEDING

In the proceeding before the three-judge district court, Wisconsin Right to Life, Inc. was the plaintiff and the Federal Election Commission was the original defendant. Following this Court's remand to the district court in *Wisconsin Right to Life, Inc.* v. *FEC*, 546 U.S. 410 (2006), Senator John McCain, Representative Tammy Baldwin, Representative Christopher Shays, and Representative Martin Meehan intervened as defendants.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

INTRODUCTION 2

STATEMENT 4

SUMMARY OF ARGUMENT 14

ARGUMENT 17

I. CONGRESS HAS A COMPELLING INTEREST IN BARRING THE USE OF GENERAL CORPORATE TREASURIES TO FUND ADVERTISING THAT IS LIKELY TO INFLUENCE FEDERAL ELECTIONS, EVEN IF THE ADVERTISING ALSO ADDRESSES LEGISLATIVE ISSUES 17

A. This Court Has Long Recognized Congress's Compelling Interest In Tempering The Corrosive Effect Of Aggregated Corporate Wealth On Federal Elections 17

B. Congress's Compelling Interest Applies Equally To Express Advocacy And To "Issue Advocacy" That Is Its Functional Equivalent 19

II. THIS COURT'S PRECEDENT DEMONSTRATES THAT SECTION 203 MAY CONSTITUTIONALLY BE APPLIED TO WRTL'S ADVERTISEMENTS 21

A. The Undisputed Facts Demonstrate That WRTL's Advertisements Functioned As Election Advocacy 21

B. WRTL Had Ample Alternative Means To Disseminate Its Message 29

III. THE DISTRICT COURT WAS WRONG TO REFUSE TO CONSIDER THE CONTEXT OF THE ADVERTISEMENTS 31

A. The District Court's Approach Contravenes This Court's Holding In *McConnell* 32

B. A Proper Contextual Inquiry Is Administrable 37

CONCLUSION 43

TABLE OF AUTHORITIES

CASES

Page(s)

Apex Hosiery Co. v. *Leader*, 310 U.S. 469 (1940) 41

Austin v. *Michigan Chamber of Commerce*, 494 U.S. 652 (1990) 17

Brandenburg v. *Ohio*, 395 U.S. 444 (1969) 35

Brown v. *Hartlage*, 456 U.S. 45 (1982) 21, 35-36

Brown v. *Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982) 38, 39

Buckley v. *Valeo*, 424 U.S. 1 (1976) 5, 6, 19, 38, 39

Chaplinsky v. *New Hampshire*, 315 U.S. 568 (1942) 35

FEC v. *Beaumont*, 539 U.S. 146 (2003) 4, 6, 17, 18, 30

FEC v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) 6, 17, 18, 30, 40

FEC v. *National Right to Work Committee*, 459 U.S. 197 (1982) 4, 5, 17, 18, 39

Heffron v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) 35

McConnell v. *FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003) 33, 37

McConnell v. *FEC*, 540 U.S. 93 (2003) ..... *passim*

Towne v. *Eisner*, 245 U.S. 418 (1918) 35

United States v. *Automobile Workers*, 352 U.S. 567 (1957) 4, 5, 17

United States v. *Falstaff Brewing Corp.*, 410 U.S. 526 (1973) 41

Watts v. *United States*, 394 U.S. 705 (1969) 36

STATUTES AND REGULATIONS

2 U.S.C. § 431 (1974) 5

2 U.S.C. § 434 ..... 8, 29

2 U.S.C. § 437h note 1

2 U.S.C. § 441b 2, 6, 7, 29

2 U.S.C. § 608 (1974) 5
28 U.S.C. § 1253 1
Act of Jan. 26, 1907, ch. 420, 34 Stat. 864-865 4
Federal Corrupt Practices Act of 1925, §§ 308, 313, 43 Stat. 1072, 1074 4
Labor Management Relations Act of 1947, Pub. L. No. 80-101, § 304, 61 Stat. 159 5
Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 ..... *passim*
11 C.F.R. § 114.10 6

LEGISLATIVE MATERIALS

S. Rep. No. 105-167 (1998) 7
Judicial Nominations, Filibusters, and the Constitution: Hearing Before the Subcommittee on the Constitution, Civil Rights and Property Rights of the Senate Committee on the Judiciary, 108th Cong., 1st Sess. (2003) 10, 23

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WISCONSIN RIGHT TO LIFE, INC.

Appellee.

OPINIONS BELOW

The opinion of the three-judge district court, *Wisconsin Right to Life, Inc.* v. *FEC*, No. 04-1260, 2006 WL 3746669 (D.D.C. Dec. 21, 2006), is unreported and reprinted at JS App. 1a-39a.[1] Prior opinions of the district court are also unreported and reprinted at JS App. 47a-48a and 49a-63a.

JURISDICTION

The three-judge district court entered its opinion and order on December 21, 2006. On December 28, 2006, the court issued an order stating that the December 21 order was "a final appealable order as to those issues decided in the opinion accompanying that order," and that there was "no just reason to delay an appeal." JS App. 40a. Appellants filed a notice of appeal on December 29, 2006. *Id.* at 42a-43a. This Court has jurisdiction over this appeal pursuant to Section 403(a)(3) of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 113-114, codified at 2 U.S.C. § 437h note, and 28 U.S.C. § 1253.

[1] "JS App." refers to the Appendix to Appellants' Jurisdictional Statement. "JA" refers to the Joint Appendix.

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions and regulations are reproduced at JS App. 64a-79a.

INTRODUCTION

In a landmark decision just three Terms ago in *McConnell* v. *FEC*, 540 U.S. 93 (2003), this Court reaffirmed that Congress has a compelling interest in guarding against "the corrosive and distorting effects" that unregulated corporate or union wealth may have on federal elections. *Id.* at 205 (citation and internal quotation marks omitted). After considering a voluminous record and extensive briefing, this Court concluded that Section 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA), 2 U.S.C. § 441b—which bars corporations and unions from using funds from their general treasuries to finance "electioneering communications" but permits them to establish separate, segregated funds for that purpose—is narrowly tailored to achieve that critical legislative goal. *See* 540 U.S. at 206-209.

In doing so, *McConnell* repudiated the notion that BCRA's funding restrictions (and related reporting requirements) could apply only to advertisements employing "magic words" expressly advocating or opposing a candidate's election. *See* 540 U.S. at 193. And it rejected the claim, vigorously urged by BCRA's opponents, that Section 203 could not constitutionally encompass "issue advocacy." *See id.* at 206-207. Rather, this Court held that "[t]he justifications for the regulation of express advocacy apply equally" to advertisements that on their face only exhort the audience to contact a candidate about an issue, "if the ads are intended to influence the voters' decisions and have that effect." *Id.* at 206. Such ads are "the functional equivalent of express advocacy" because they achieve the same result as explicit electioneering—permitting corporations and unions to use general treasury funds to sway federal elections. *Id.*

The undisputed facts demonstrate that the advertisements Wisconsin Right to Life, Inc. sought to broadcast in this case fall squarely into that category. All of WRTL's ads denounced a "group of Senators" for filibustering judicial

nominees and "causing gridlock," JS App. 58a-63a; two of the ads emphasized that the Senators were "backing up some of our courts to a state of emergency," *id.* at 58a-61a. The ads then urged the audience to contact Senator Feingold—then a candidate for federal office—and Senator Kohl to tell them to oppose the filibusters. *Id.* at 58a-63a. It was public knowledge that Feingold was one of the "group of Senators" to whom the ads referred. Indeed, WRTL itself had publicized Senator Feingold's involvement in the filibusters (an important issue in the election) and called for his defeat on that ground. Although the ads asked the audience to contact Senators Feingold and Kohl, they provided no contact information for them, instead directing viewers to a website criticizing them for their role in the filibusters. WRTL sought to run its ads immediately before the 2004 election (while Congress was in recess and no vote on the filibuster was imminent) and did not run them after the election (when the filibuster controversy came to a head). Although WRTL had a PAC, it made no attempt to use PAC funds for the ads, but instead sought to use its general treasury funds—which included sizeable donations from business corporations, including thousands of dollars earmarked specifically for the ads at issue here—to underwrite its advertising.

The district court shut its eyes to these facts. It refused to consider anything beyond the text and images of the ads themselves, holding that because the ads referred to a pending legislative issue and did not attack Senator Feingold in so many words, WRTL could not constitutionally be required to use PAC funds to finance them. By confining its inquiry to the ads' literal words and images—and failing to ask whether, understood in context, the ads in fact functioned as election advocacy—the district court committed the same error this Court corrected in *McConnell*. In doing so, it reopened an avenue BCRA had closed for circumvention of the decades-old restriction on the use of general treasury funds to influence federal elections. And it reopened that route not only for non-profit organizations like WRTL, but for all for-profit corporations and labor unions.

WRTL's advertisements, like many of the ads this Court considered in *McConnell*, may have addressed an "issue" in which WRTL had a genuine interest, but their potential to influence the impending federal election was nonetheless patent. As "issue ads" that *also* functioned as election advocacy, and that were funded by large corporate contributions, WRTL's ads are at the heart of the problem for which BCRA crafted a solution—a solution this Court upheld in *McConnell*.

STATEMENT

1. *FECA and the Evolution of the "Magic Words" Test.* For a century, Congress has worked to protect the integrity of the political process by regulating the use of corporate funds to influence federal elections. In 1894, Elihu Root characterized the outsize effect of corporate war chests on elections as "a constantly growing evil which has done more to shake the confidence of the plain people of small means of this country in our political institutions than any other practice which has ever obtained since the foundation of our Government." *United States* v. *Automobile Workers*, 352 U.S. 567, 571 (1957) (quoting Root, *Addresses on Government and Citizenship* 143 (1916)). Distress over corporate contributions heightened during and after the 1904 presidential elections. *See FEC* v. *Beaumont*, 539 U.S. 146, 152 (2003); *Automobile Workers*, 352 U.S. at 571-575. Congress responded by enacting the Tillman Act of 1907, which prohibited "any corporation . . . [from] mak[ing] a money contribution in connection with any election to any political office." Act of Jan. 26, 1907, ch. 420, 34 Stat. 864-865; *see Automobile Workers*, 352 U.S. at 575. Congress strengthened that Act in 1925 with passage of the Federal Corrupt Practices Act, which extended contribution restrictions to cover "anything of value" and made the giving or receiving of corporate contributions in a federal election a federal crime. *FEC* v. *National Right to Work Comm. (NRWC)*, 459 U.S. 197, 209 (1982); *see* Federal Corrupt Practices Act of 1925, §§ 308, 313, 43 Stat. 1072, 1074.

By the 1940s, Congress became aware that the prohibition on contributions was insufficient to address "[t]he evil [of] the use of corporation . . . funds to influence the public at large to vote for a particular candidate or a particular party." *Automobile Workers*, 352 U.S. at 589. As Senator Taft commented, nothing in the existing law prevented a "candidate for office [from having] his corporation friends publish an advertisement for him in the newspapers every day for a month before [the] election." *Id.* at 583 (quoting 93 Cong. Rec. 6439). In 1947, in the Taft-Hartley Act, Congress "plug[ged] up [that] loophole" by expanding the restrictions expressly to include independent expenditures by corporations, and extending the law's reach to labor unions as well. *Id.* (quoting 93 Cong. Rec. 6439); *see* Labor Management Relations Act of 1947, Pub. L. No. 80-101, § 304, 61 Stat. 159.

The Federal Election Campaign Act of 1971 (FECA) carried forward these prohibitions, but "expressly permitted corporations and unions to establish and administer separate segregated funds (commonly known as political action committees, or PACs) for election-related contributions and expenditures." *McConnell* v. *FEC*, 540 U.S. 93, 118 (2003). Congress thus sought to provide appropriate avenues for political expression while mitigating the corrosive effects of massive contributions and expenditures flowing from corporate war chests. *See NRWC*, 459 U.S. at 207-208.

In *Buckley* v. *Valeo*, 424 U.S. 1 (1976), this Court adopted a narrowing construction of FECA that gave rise to what came to be known as the "magic words" test. *McConnell*, 540 U.S. at 191. As originally enacted, FECA limited independent expenditures by individuals, as well as corporations and unions, "relative to a clearly identified candidate." *Buckley*, 424 U.S. at 39 (quoting then-2 U.S.C. § 608(e)(1) (1974)). It also mandated disclosure of certain expenditures, defined as the use of money or other assets "for the purpose of . . . influencing" a federal election. *Id.* at 77 (quoting 2 U.S.C. § 431(f) (1974)). In order to avoid the potential for unconstitutional vagueness, the Court construed both phrases (except insofar as they applied to candidates or political committees, *see id.* at 79) as applying only to "commu-

nications that expressly advocate the election or defeat of a clearly identified candidate," *id.* at 80. The Court provided examples of terms that it considered "express advocacy," including "vote for," "elect," "support," "defeat," and "reject," *id.* at 44 n.52—the terms that eventually became known as the "magic words."[2] Subsequently, in *FEC* v. *Massachusetts Citizens for Life, Inc.* (*MCFL*), the Court applied the same construction to 2 U.S.C. § 441b, which requires corporations and unions to use separate segregated funds, rather than their general treasuries, for expenditures made "in connection with" a federal election. 479 U.S. 238, 241 (1986).[3]

Labor unions and corporations, both for-profit and non-profit, soon learned that they could easily exploit the "magic words" test to circumvent core provisions of FECA. They began sponsoring so-called "issue" advertisements, aired in the weeks immediately before elections, that strategically avoided words of express advocacy but nevertheless were effective in influencing voters' decisions. *See McConnell*, 540 U.S. at 126. Because such ads did not employ the "magic words," corporations and unions could pay for them out of

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[2] After construing both provisions in this manner, the *Buckley* Court upheld the disclosure provision, *see* 424 U.S. at 80-82, but struck down the limits on independent expenditures, *see id.* at 45-50.

[3] Section 441b's restrictions on the use of general treasury funds apply to non-profit as well as business corporations. *See* 2 U.S.C. § 441b(a). This Court has upheld that application, noting that non-profit corporations can easily serve as a conduit for funds from business corporations. *See McConnell*, 540 U.S. at 209-211; *Beaumont*, 539 U.S. at 159-160. *MCFL* recognized a narrow exception: it held that Section 441b's expenditure restrictions could not constitutionally be applied to non-profit organizations that (1) are formed in order to promote political ideas and cannot engage in business activities; (2) have no shareholders or other persons with a claim on their assets or earnings; and (3) were not established by a business corporation or a labor union and do not accept contributions from such entities (and thus cannot serve as a conduit for corporate or union funds that could not otherwise be used to finance election-related expenditures under FECA). *See* 479 U.S. at 264. Such organizations have come to be known as "*MCFL* organizations." *See McConnell*, 540 U.S. at 210; *see also* 11 C.F.R. § 114.10 (implementing the *MCFL* exception).

their general treasury funds; moreover, they were not subject to FECA's disclosure requirements and therefore could be run without revealing the identity of their sponsors. *See id.* Issue "ads were attractive . . . precisely because they were beyond FECA's reach, enabling candidates and their parties to work closely with friendly interest groups to sponsor so-called issue ads when the candidates themselves were running out of money." *Id.* at 127. While those who bankrolled the ads often hid behind unrevealing names like "Voters for Campaign Truth," *id.* at 128 n.23, "candidates and officeholders" were often "fully informed about the sponsorship of so-called issue ads," *id.* at 128-129.

During the 1990s, the use of "issue ads" rapidly proliferated. In the 1996 election cycle, about $135 to $150 million was spent on issue ads; in the ensuing two years, that amount increased to $250 to $340 million; and in the 2000 election cycle, 130 groups broadcast 1100 different ads, spending over $500 million. *McConnell*, 540 U.S. at 128 n.20. Such widespread use of issue ads rendered FECA's restrictions on corporate and union expenditures toothless. As one Senator who participated in Congress's pre-BCRA investigation of the state of the campaign-finance laws put it, "bogus issue advertising"—together with the growing use of soft money—"virtually destroyed our campaign finance laws, leaving us with little more than a pile of legal rubble." *Id.* at 129-130 (quoting S. Rep. No. 105-167, vol. 3, at 4535 (1998) (statement of Sen. Collins)).

2. *Congress's Response.* Congress adopted Section 203 of BCRA to close the "magic words" loophole and to put an end to the blatant evasion of the campaign-finance laws. Section 203 amended Section 441b of FECA by barring corporations and unions from financing "electioneering communications" with money from their general treasuries. 2 U.S.C. § 441b(b)(2). Corporations and unions remained free to pay for electioneering communications with funds from PAC accounts. *See id.* § 441b(b)(2)(C).

BCRA defined "electioneering communication" as a "broadcast, cable, or satellite communication" that (1) "refers to a clearly identified candidate for Federal of-

fice"; (2) is made within 60 days before a general election or within 30 days before a primary election for the office sought by the candidate; and (3) is, with the exception of communications referring to a candidate for President or Vice President, "targeted to the relevant electorate." 2 U.S.C. § 434(f)(3)(A)(i).[4] Through this carefully tailored, bright-line definition, Congress sought to close the "issue ad" loophole while avoiding the vagueness concerns *Buckley* raised regarding FECA's definition of "expenditure."

3. *McConnell* v. *FEC*. A number of parties brought constitutional challenges to BCRA. The plaintiffs made two primary arguments that Section 203 was unconstitutional. First, they contended that Congress could not constitutionally regulate the funding of any advertising other than "express advocacy" using the "magic words" identified in *Buckley*. *McConnell*, 540 U.S. at 190. Second, they claimed that BCRA's definition of "electioneering communication" was unconstitutionally overbroad, because it encompassed significant numbers of "genuine issue ads" whose funding plaintiffs claimed Congress could not constitutionally restrict. *See id.* at 204-206.

After reviewing a massive record replete with evidence showing the extent of the "issue ad" problem, this Court rejected both contentions. It first made clear that *Buckley*'s "express advocacy" gloss on FECA was a matter of "statutory interpretation," not "constitutional command." 540 U.S. at 191-192. Indeed, the Court concluded that "the unmistakable lesson from the record in this litigation . . . is that *Buckley*'s magic words requirement is functionally meaningless." *Id.* at 193. Advertisers could "easily evade the line by eschewing the use of magic words," and "although the resulting advertisements do not urge the viewer to vote for or

[4] A communication is deemed "targeted to the relevant electorate" if it "can be received by 50,000 or more persons" in the district (in the case of House races) or State (in the case of Senate races) the candidate seeks to represent. 2 U.S.C. § 434(f)(3)(C).

against a candidate in so many words, they are no less clearly intended to influence the election." *Id.*

This Court then held that Section 203 was not overbroad, explaining that "[t]he justifications for the regulation of express advocacy apply equally" to issue ads aired during the weeks before an election "if the ads are intended to influence the voters' decisions and have that effect." 540 U.S. at 206. The Court noted that "the vast majority" of ads in the record that would have fallen within BCRA's definition of electioneering communications "clearly had [an electioneering] purpose." *Id.* Moreover, the Court observed, "whatever the precise percentage may have been in the past, in the future corporations and unions may finance genuine issue ads during [BCRA's specified pre-election period] by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." *Id.* The Court rejected the argument that Section 203 could not constitutionally be applied to non-profit corporations, but construed it not to apply to *MCFL* organizations. *See id.* at 209-211.

4. *WRTL's Advertisements and the 2004 Election.* In this as-applied challenge, Wisconsin Right to Life, Inc. claims that Section 203 may not constitutionally be applied to bar it from using general treasury funds to broadcast three advertisements that fall within BCRA's definition of "electioneering communication" and that WRTL planned to air shortly before the 2004 elections.

WRTL is a non-profit corporation organized under Section 501(c)(4) of the Internal Revenue Code. Am. Compl. ¶ 20; Pl.'s Findings of Fact ¶ 1. WRTL accepts contributions from business corporations; indeed, in 2004 it received over $315,000 from corporations, the "vast majority" from business corporations. FEC SJ Ex. 3 at 147-151; FEC SJ Ex. 60.[5] Accordingly, as WRTL acknowledges, Am. Compl. ¶ 23;

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[5] In citations to the record, "FEC SJ Ex." refers to the exhibits to the motion for summary judgment filed by the Federal Election Commission on July 14, 2006. "Intervenors SJ Ex." refers to the exhibits to the

Pl.'s Findings of Fact ¶ 3, it is not an *MCFL* organization and is not entitled to an exemption from Section 203. *See supra* note 3. WRTL must therefore finance any ads qualifying as "electioneering communications" through a PAC. WRTL has long maintained and used a PAC, the Wisconsin Right to Life Political Action Committee.

In 2004, WRTL and its PAC targeted Senator Russell Feingold—then running for reelection to the Senate—for defeat. In a March 2004 press release, WRTL's PAC announced its "*Top Election Priorities*: Re-elect President Bush . . . Send Feingold Packing," and opined that "the defeat of Feingold must be uppermost in the minds of Wisconsin's right to life community in the 2004 elections." JA 82-84. Three weeks later, WRTL itself issued a similar press release proclaiming: "Top Election Priorities for Right to Life Movement in Wisconsin: Re-elect George W. Bush . . . Send Feingold Packing!" JA 78.

The Senate filibuster of judicial nominees was an important campaign issue in the 2004 Wisconsin Senate race. Senator Feingold took part in and publicly defended the filibusters.[6] WRTL explicitly connected its opposition to Senator Feingold to the filibuster issue. WRTL's PAC's March 2004 press release, for example, emphasized that "[w]e do not want Russ Feingold to continue to have the ability to thwart President Bush's judicial nominees," and noted that Feingold's Republican opponents "all stated they would oppose a filibuster." JA 82-83.

WRTL began airing the three advertisements at issue here in late July and early August of 2004. The lead-in to the advertisements varied, but each ad criticized a "group of Senators" for filibustering judicial nominees, accused the

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motion for summary judgment filed by Appellants, as intervenor-defendants in the district court, on July 14, 2006.

[6] *See Judicial Nominations, Filibusters, and the Constitution: Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the Senate Comm. on the Judiciary* ("*Judicial Nominations Hearing*"), 108th Cong., 1st Sess. 5-7 (2003) (statement of Sen. Feingold).

Senators of blocking "qualified" nominees and "causing gridlock," and ended by exhorting the audience to "[c]ontact Senators Feingold and Kohl and tell them to oppose the filibuster." JS App. 58a-63a. None of the ads contained contact information for Senators Feingold and Kohl. Instead, they directed the audience to a website maintained by WRTL called "BeFair.org," which included material criticizing Senator Feingold for his role in the filibusters. JS App. 59a, 61a, 62a.

5. *WRTL's Challenge.* The primary election was held on September 14, 2004, and the general election on November 2, 2004. BCRA's electioneering communications period began on August 15, 2004, 30 days before the primary.

On July 28, 2004, WRTL filed suit. WRTL asserted that it anticipated that its three "ongoing advertisements [would be considered] electioneering communications from August 15 to November 2, [2004,] because they meet the statutory and regulatory definitions." Compl. ¶ 23. WRTL claimed that Section 203 could not constitutionally be applied to restrict the funding of those ads and sought a preliminary and permanent injunction barring the FEC from enforcing Section 203 as to those ads. Compl. ¶¶ 61-62, Prayer for Relief ¶ 4. In addition, WRTL sought broader declaratory and injunctive relief finding Section 203 unconstitutional as applied to any advertisement that constituted "grassroots lobbying." Compl. ¶¶ 61-62, Prayer for Relief ¶ 3.

The district court denied WRTL's request for a preliminary injunction. JS App. 56a. Relying on a footnote in *McConnell*, the district court stated that "the reasoning of the *McConnell* Court leaves no room for the kind of 'as applied' challenge WRTL propounds before us." *Id.* at 52a (citing 540 U.S. at 190 n.73). The court further explained that "[t]he facts suggest that WRTL's advertisements may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating." *Id.* at 53a. It noted:

> Here, WRTL and WRTL's PAC used other print and electronic media to publicize its filibuster message—a campaign issue—during the months prior

> to the electioneering blackout period, and only as the blackout period approached did WRTL switch to broadcast media. This followed the PAC endorsing opponents seeking to unseat a candidate whom WRTL names in its broadcast advertisement, and the PAC announcing as a priority "sending Feingold packing."

Id. at 53a-54a (citations omitted). The court also found a preliminary injunction unwarranted because "the actual limitation on plaintiff's freedom of expression ... is not nearly so great as plaintiff argues." *Id.* at 54a. "BCRA does not prohibit the sort of speech plaintiff would undertake, but only requires that corporations and unions engaging in such speech must channel their spending through political action committees (PACs)." *Id.*

The district court subsequently dismissed WRTL's complaint, holding "for the reasons set forth in its prior opinion ... that WRTL's 'as-applied' challenge to BCRA is foreclosed by ... *McConnell*." JS App. 48a.

6. *WRTL's Appeal and this Court's Remand.* WRTL appealed to this Court, which vacated the district court's judgment, holding that the district court had misread its footnote in *McConnell* and explaining that "[i]n upholding § 203 against a facial challenge, we did not purport to resolve future as-applied challenges." JS App. 45a. As to the district court's statement that the facts of this case "suggest that WRTL's advertisements may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating," the Court concluded that it was "not clear" whether the district court had "intended ... to rest on this ground" in dismissing WRTL's complaint. *Id.* The Court remanded for the district court "to consider the merits of WRTL's as-applied challenge in the first instance." *Id.* at 46a.

7. *The District Court's Order on Remand.* Following the remand, Senator McCain and Representatives Baldwin, Shays, and Meehan intervened as defendants. The parties then engaged in limited discovery and filed cross-motions for

summary judgment. On December 21, 2006, in an opinion authored by Judge Leon and joined by Judge Sentelle, the three-judge court granted WRTL's motion for summary judgment and held Section 203 unconstitutional as applied to the three advertisements WRTL sought to run in 2004. JS App. 24a.[7]

The district court first held that WRTL's challenge regarding those three advertisements was not moot. JS App. 12a.[8] Turning to the merits, the court opined that it would be both "practically and theoretically unacceptable" in an as-applied challenge to Section 203 to consider any facts other than the text and images of the advertisements themselves. *Id.* at 16a. Accordingly, the court held that it would "limit its consideration to language within the four corners of the . . . ads." *Id.* at 18a. Observing that WRTL's ads "describe . . . an ongoing issue of legislative concern," and "do not promote, attack, support, or oppose" Senator Feingold or expressly refer to Feingold's position on the filibuster issue, the court concluded that WRTL's ads were not the "functional equivalent of express advocacy" and thus did not implicate the compelling interest underlying Section 203 of BCRA. *Id.* at 19a-20a, 23a. The court did not address

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[7] The district court addressed only WRTL's as-applied challenge with respect to the three specific advertisements it sought to run in 2004, finding that WRTL's generalized challenge to BCRA's application to "grassroots lobbying" was unripe. JS App. 13a. WRTL has not appealed that ruling, and it is not before this Court.

[8] Before the district court, Appellants contended that WRTL's challenge with respect to the three 2004 ads was moot and not capable of repetition because WRTL had not demonstrated that it was likely to run ads in the future that would present similar factual circumstances. The district court rejected that argument, stating that the specific factual circumstances surrounding the ads were not relevant to WRTL's as-applied challenge. JS App. 11a-12a. Appellants disagree with that premise for the reasons given below. *See infra* Part III. However, Appellants no longer contend that the dispute is nonjusticiable, particularly in light of more recent attempts by WRTL to finance electioneering communications with its general treasury funds.

WRTL's ability to use alternative means to disseminate its message. *Id.* at 24a n.24.

Judge Roberts dissented, stating that the majority's "plain facial analysis of the text in WRTL's 2004 advertisements—ignoring the context in which the text was developed"—was "inconsistent with *McConnell*, . . . inconsistent with this panel's own prior rulings, and finds little support in logic." JS App. 25a. Examining the context of the ads, Judge Roberts found that "WRTL's role in the political environment that wrought the ad campaign in the first place could be probative of the intent of the ads" and cited a long list of facts suggesting an electioneering purpose. *Id.* at 34a; *see also id.* at 34a-36a. He concluded, however, that there was a genuine issue of material fact as to WRTL's subjective intent in running the ads and thus would not have resolved the case on summary judgment. *Id.* at 39a.

SUMMARY OF ARGUMENT

This Court has long recognized Congress's compelling interest in guarding against the undue and damaging influence that business corporations and unions could exercise on federal elections if permitted to use their general treasuries to fund electioneering. That interest extends equally to not-for-profit advocacy groups, like WRTL, to the extent they act as conduits for corporate or union funds. In *McConnell* v. *FEC*, this Court held that Congress's interest is not limited to regulating particular words or forms used to advocate for or against a candidate, but encompasses all advertisements that are the "functional equivalent of express advocacy." 540 U.S. 93, 206 (2003).

The uncontested facts leave no doubt that WRTL's advertisements fall into that category. The ads denounced a "group of Senators," of whom Senators Feingold and Kohl were known to be a part, for filibustering, and then instructed the audience to call Feingold and Kohl and tell them to oppose the filibusters. That alone is sufficient to establish the likelihood that the ads would have functioned as electioneering: any voters aware of Feingold's public position on the filibusters, or who could infer it from the ads themselves,

would have clearly understood the ads to call into question Feingold's fitness to continue serving in the Senate.

If more were needed, numerous additional facts confirm the electioneering nature of WRTL's ads: (1) WRTL and its PAC had openly advocated for Senator Feingold's defeat in the 2004 election and had identified the filibuster issue as a reason he should be removed from office; (2) Feingold's Republican opponents had also made the filibusters a central issue in the campaign; (3) WRTL's ads provided no contact information for Senator Feingold, but did refer the audience to a website that *expressly* criticized Feingold for his role in the filibusters; and (4) WRTL sought to broadcast the ads immediately prior to the election, while the Senate was in recess, rather than when a vote to end a filibuster was imminent. Moreover, WRTL had ample alternative means for disseminating its message, including using its established PAC or constituting itself as an *MCFL* organization that does not accept contributions from business corporations.

Rather than ask whether WRTL's ads would have functioned as election advocacy in the context in which their audience would have received them, the district court refused to look beyond the ads' literal words and images. It concluded that because the ads referred to a pending legislative issue and did not attack Senator Feingold in so many words, their funding could not be regulated. That blinkered approach offends common sense and cannot be reconciled with *McConnell*, which made clear that Congress's compelling interest in regulating corporate expenditures goes beyond express support for or opposition to a candidate, extending to any ad that has the same election-influencing function. It also threatens to undo the work that Congress did in BCRA, and that this Court upheld in *McConnell*, to close the "issue ad" loophole—not only for non-profit advocacy groups like WRTL, but for all business corporations and unions.

The district court attempted to justify its approach by asserting that examining the context of the ads would be practically and theoretically unmanageable. Those fears are insubstantial. The district court's "practical" concern was that developing a record would prove too onerous. But no

extensive record was necessary to determine that ads criticizing a "group of Senators" including Senator Feingold were likely to function as election advocacy against Feingold when broadcast immediately before the election. In any event, this Court has previously rejected the notion that the difficulty of compiling a record to support an as-applied challenge can serve as a basis for a categorical exemption from the campaign-finance laws.

The district court's "theoretical" concern—that looking beyond the ad's four corners would involve an unworkable investigation into the advertiser's subjective intent—is also groundless. The court failed to appreciate that, in light of *McConnell*'s holding that Section 203 is constitutional as to the "vast majority" of ads within its coverage, 540 U.S. at 206, an as-applied challenge should succeed only if the ads are so different in kind from that "vast majority" that they do not implicate the compelling interests underpinning the statute. To resolve that question, it is not necessary to plumb the advertiser's subjective state of mind. Any ad that satisfies BCRA's definition of "electioneering communication" and that is likely to influence voters' decisions, based on an examination of the ad's objective content and context, sufficiently evinces an electioneering purpose and implicates the legitimate goals of BCRA. In this case, moreover, WRTL's open advocacy of Feingold's defeat, precisely because of his role in the filibusters, can leave no real doubt of its electioneering purpose.

For those reasons, no trial is necessary to resolve any disputed issues here. WRTL's ads plainly fall at the core of Section 203's constitutional application, and this Court should reverse the district court's judgment and remand for entry of summary judgment for appellants.

ARGUMENT

I. CONGRESS HAS A COMPELLING INTEREST IN BARRING THE USE OF GENERAL CORPORATE TREASURIES TO FUND ADVERTISING THAT IS LIKELY TO INFLUENCE FEDERAL ELECTIONS, EVEN IF THE ADVERTISING ALSO ADDRESSES LEGISLATIVE ISSUES

A. This Court Has Long Recognized Congress's Compelling Interest In Tempering The Corrosive Effect Of Aggregated Corporate Wealth On Federal Elections

This Court reaffirmed in *McConnell* what is now well-established: that Congress has a compelling interest in preventing the "corrosive and distorting effects" of corporate and union treasuries on the integrity of the political process. *McConnell* v. *FEC*, 540 U.S. 93, 205 (2003). As the Court explained, "the legislative judgment that the special characteristics of the corporate structure require particularly careful regulation" is long-standing. *Id.* (quoting *FEC* v. *Beaumont*, 539 U.S. 146, 155 (2003)). Indeed, Congress has regulated corporate contributions to candidates for a full century, and it has regulated election-related expenditures by corporations and unions for 60 years. *See United States* v. *Automobile Workers*, 352 U.S. 567, 570-584 (1957); *McConnell*, 540 U.S. at 114-118.

At least two significant justifications support restricting the use of corporate treasury funds to influence federal elections. First, the "special advantages which go with the corporate form of organization," *FEC* v. *National Right to Work Comm. (NRWC)*, 459 U.S. 197, 207 (1982), permit corporations to use "resources amassed in the economic marketplace" to obtain "an unfair advantage in the political marketplace." *FEC* v. *Massachusetts Citizens for Life, Inc. (MCFL)*, 479 U.S. 238, 257 (1986); *accord Beaumont*, 539 U.S. at 154; *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 658-659 (1990). As the Court explained in *MCFL*:

> The resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation's political ideas. They reflect in-

> stead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.

479 U.S. at 258. Second, "individuals who have paid money into a corporation . . . for purposes other than the support of candidates" should not have "that money used to support political candidates to whom they may be opposed." *NRWC*, 459 U.S. at 208; *accord MCFL*, 479 U.S. at 260.

In short, Congress has a compelling interest in mitigating the effect on federal elections of "immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation" to either the general public's or the corporation's shareholders' "support for the corporation's political ideas." *McConnell*, 540 U.S. at 205. Requiring corporations to fund their election-related speech through PACs serves that end by "allow[ing] corporate political participation without the temptation to use corporate [general treasury] funds for political influence." *Beaumont*, 539 U.S. at 163.

Those concerns are also applicable to non-profit advocacy groups that accept donations from business corporations. *See McConnell*, 540 U.S. at 209-211; *Beaumont*, 539 U.S. at 159-160 & n.5. Such groups can "serv[e] as conduits for the type of direct spending that creates a threat to the political marketplace." *MCFL*, 479 U.S. at 264; *see also McConnell*, 540 U.S. at 211. Accordingly, although this Court in *MCFL* recognized the existence of a limited class of non-profit organizations that are sufficiently different from business corporations that they do not implicate Congress's interest in regulating corporate election spending, it limited the *MCFL* exemption to organizations that were not established by a business corporation or labor union and do not accept contributions from such entities. *MCFL*, 479 U.S. at 264; *see McConnell*, 540 U.S. at 211. Here, because WRTL accepted substantial donations from for-profit corporations, WRTL does not qualify for an *MCFL* exemption, as it has acknowledged. Its election-related expenditures raise pre-

cisely the concerns regarding corporate spending that Congress has a compelling interest in addressing.

B. Congress's Compelling Interest Applies Equally To Express Advocacy And To "Issue Advocacy" That Is Its Functional Equivalent

This Court held in *McConnell* that the compelling interest in regulating corporate and union election expenditures is *not* limited to advertisements that contain words expressly advocating the election or defeat of a candidate. *See* 540 U.S. at 190-194, 204-207. Rather, "[t]he justifications for the regulation of express advocacy apply equally to" *all* advertisements that "are intended to influence the voters' decisions and have that effect" and thus are "the functional equivalent of express advocacy." *Id.* at 206.

BCRA's opponents argued vigorously that its restrictions on electioneering communications could not constitutionally be applied to "issue advocacy." 540 U.S. at 190. This Court unequivocally rejected that contention. It explained that issue advocacy—"the discussion of political policy generally or advocacy of the passage or defeat of legislation"—is entitled to no greater protection under the First Amendment than "[a]dvocacy of the election or defeat of candidates for federal office." *Id.* at 205 (quoting *Buckley*, 424 U.S. at 48). And it concluded:

> [W]e [are not] persuaded . . . that the First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy. That notion cannot be squared with our longstanding recognition that the presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad. Indeed, the unmistakable lesson from the record in this litigation . . . is that *Buckley*'s magic-words requirement is functionally meaningless. Not only can advertisers easily evade the line by eschewing the use of magic words, but they would seldom choose to use such words even if permitted. And although the resulting advertisements do not urge the viewer to vote

> for or against a candidate in so many words, they are no less clearly intended to influence the election.

McConnell, 540 U.S. at 193.

This Court went on to reject plaintiffs' contention that BCRA's definition of "electioneering communications" was unconstitutionally overbroad. Although the Court accepted the hypothesis that BCRA's definition might apply to some ads that did not function as electioneering and thus did not implicate Congress's regulatory goals, it concluded after reviewing the extensive record that "the vast majority of ads," including "issue ads," that identified a candidate and were broadcast during the relevant pre-election period "clearly had [an electioneering] purpose." 540 U.S. at 206. "Far from establishing that BCRA's application to pure issue ads is substantial, either in an absolute sense or relative to its application to election-related advertising, the record strongly supports the contrary conclusion." *Id.* at 207. In short, the record confirmed Congress's common-sense judgment that ads clearly identifying a candidate in a federal election and broadcast to 50,000 or more people in the relevant district shortly before the election will almost certainly operate as electioneering.

The Court further observed that "whatever the precise percentage" of ads meeting BCRA's criteria but not constituting electioneering "may have been in the past, in the future corporations . . . may finance" such ads "by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." 540 U.S. at 206.

McConnell thus laid out the basic principles that must govern any as-applied challenge to Section 203 of BCRA: "Issue ads" are entitled to no greater constitutional protection than express electioneering. Congress may regulate the funding of ads that focus on "issues" and do not expressly support or oppose a candidate if the ads nevertheless function as election advocacy. Advertisements that meet BCRA's definition of "electioneering communication" are

highly likely to fall into that category. And, in "doubtful cases," advertisers' ability to pay for their ads from a segregated fund counsels against a finding of unconstitutionality.

II. This Court's Precedent Demonstrates That Section 203 May Constitutionally Be Applied To WRTL's Advertisements

Against the backdrop of *McConnell*, resolving WRTL's as-applied challenge is a straightforward task. The undisputed facts demonstrate that WRTL's ads functioned as election advocacy and thus are at the core of the problem Congress legitimately addressed in BCRA. As this Court observed of another as-applied First Amendment challenge, "acknowledging the difficulty of rendering a concise formulation" to govern all such challenges, "or recognizing the possibility of borderline cases, does not disable us from identifying cases far from any troublesome border." *Brown* v. *Hartlage*, 456 U.S. 45, 56 (1982). This is such a case.

A. The Undisputed Facts Demonstrate That WRTL's Advertisements Functioned As Election Advocacy

WRTL sought to run one television and two radio ads during the period immediately before the 2004 primary and general elections. The radio ad entitled "Wedding" is illustrative:

> PASTOR: And who gives this woman to be married to this man?
>
> BRIDE'S FATHER (rambling): Well, as father of the bride, I certainly could. But instead, I'd like to share a few tips on how to properly install drywall. Now you put the drywall up . . .
>
> [VOICE-OVER]: Sometimes it's just not fair to delay an important decision.
>
> But in Washington it's happening. A group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple "yes" or "no" vote. So qualified candidates don't get a chance to serve.

> Yes, it's politics at work, causing gridlock and backing up some of our courts to a state of emergency.
>
> BRIDE'S FATHER (rambling): Then you get your joint compound and your joint tape and put the tape up over . . .
>
> Contact Senators Feingold and Kohl and tell them to oppose the filibuster.
>
> Visit: BeFair.org. That's BeFair.org.
>
> Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee.

JS App. 58a-59a.[9] Senator Feingold, who was running for reelection in 2004, was, of course, one of the "group of Senators" who had participated in filibusters of judicial nominees.

WRTL's advertisements possessed two critical characteristics that ensured that, when run immediately before the election, they would function as electioneering. *First*, the ads took a critical stance regarding a candidate's position on an issue (albeit by denouncing a "group of Senators" of whom the candidate was one, rather than expressly criticizing the candidate by name). And, *second*, they referred to the candidate by name in urging the audience to contact the candidate about the issue. It is precisely this type of "issue ad" that was widely used to evade the "magic words" restriction on election advocacy, that Congress was concerned to capture in BCRA's definition of "electioneering communication," and that this Court concluded Congress had a compelling interest in regulating. As *McConnell* explained: "Little difference exist[s] . . . between an ad that urge[s] viewers to 'vote against Jane Doe' and one that condemn[s]

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[9] The other radio ad, "Loan," has a different lead-in but is otherwise almost identical to "Wedding." JS App. 60a-61a. The television ad, "Waiting," likewise criticizes "a group of U.S. Senators" for "blocking qualified nominees" and "causing gridlock" by filibustering and exhorts viewers to "[c]ontact Senators Feingold and Kohl and tell them to oppose the filibuster" and to visit BeFair.org. *Id.* at 62a.

Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" 540 U.S. at 127.

The text of WRTL's ads does not expressly state that Senator Feingold is one of the "group of Senators" using "delay tactic[s] to block" "qualified candidates," "causing gridlock and backing up . . . courts to a state of emergency." JS App. 59a, 61a; *see also id.* at 62a. But that fact cannot be dispositive, as this Court's rejection of the "magic words" approach makes clear. Whether Congress may regulate an ad's financing turns not on whether it uses particular words, or whether it makes its election-related nature explicit, but whether it is likely to function as election advocacy by affecting voters' decisions. *See McConnell*, 540 U.S. at 206.

Here, Senator Feingold's participation in the filibusters was public knowledge, and Feingold had publicly defended the filibusters.[10] Moreover, the ads themselves strongly suggest that Feingold did not oppose the filibusters—if he did, an ad urging the audience to lobby him on the issue would have been gratuitous. For those Wisconsin voters who already knew Feingold's position on the filibuster issue, or who could surmise his likely position either from his party affiliation or from the strong implication of the ads themselves, the ads inescapably functioned as electioneering.[11]

The text of WRTL's ads, in conjunction with the undisputed fact that Senator Feingold was one of the "group of Senators" the ads denounced, thus suffices to decide this case. This Court need look no further to recognize that

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[10] *See Judicial Nominations Hearing*, *supra* note 6, at 5-7 (statement of Sen. Feingold).

[11] The fact that WRTL's ads also named Senator Kohl—who was not up for re-election in 2004—does not alter the effect of the ads, and such a readily available tactic should not shield an otherwise obvious electioneering ad from BCRA. Indeed, in this case, naming Senator Kohl—also a participant in the filibusters, *see, e.g.*, JA 73—merely increased the likelihood that the audience would identify both Feingold and Kohl as members of the "group of Senators" being criticized.

WRTL's ads cannot meaningfully be distinguished from the paradigmatic "Jane Doe" ads that BCRA addressed and that Congress may constitutionally regulate.

If more were needed, however, a wealth of additional undisputed evidence confirms that WRTL's ads are "the functional equivalent of express advocacy." *McConnell*, 540 U.S. at 206.

First, throughout the spring, summer, and fall of 2004, WRTL and its PAC publicly opposed Senator Feingold's re-election, endorsed his opponents, criticized him for his participation in the filibusters, and cited the filibusters as a reason he should be removed from office.[12]

In a March 5, 2004 press release, for example, WRTL's PAC endorsed Feingold's Republican opponents, commenting that "[w]e do not want Russ Feingold to continue to have the ability to thwart President Bush's judicial nominees." JA 82-83. A few weeks later, WRTL issued a press release announcing that Feingold's defeat was one of its "Top Election Priorities," resolving to "Send Feingold Packing!" and characterizing him as "tied to [a] radical pro-abortion philosophy" and lacking a "modicum of respect for human life." JA 78-80. In a July 14, 2004 "URGENT E-Alert," WRTL announced that "FILIBUSTERS BY FEINGOLD, KOHL OF THE PRESIDENT'S JUDICIAL NOMINEES MUST STOP!" and continued:

> Is it fair for Senators Feingold and Kohl to continually vote to filibuster the President's judicial nominees? You probably agree that the President's nominees deserve an up or down vote in a reasonable time frame. Yet, 16 out of 16 times over the past two years, Feingold and Kohl have voted to

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[12] WRTL had a history of electioneering against Feingold. WRTL's PAC made independent expenditures against Feingold (or for his opponent) in both the 1992 and 1998 electoral cycles. FEC SJ Exs. 11, 12. In the 1998 cycle alone, WRTL's PAC spent more than $60,000 on independent expenditures devoted in part or entirely to the defeat of Feingold or the support of his opponent. FEC SJ Ex. 12.

> filibuster certain of the President's nominees. . . . Feingold and Kohl are putting politics into the court system, creating gridlock, and costing taxpayers money.

FEC SJ Ex. 27.[13] And before the general election, WRTL's PAC distributed thousands of voter guides contrasting "Pro-Abortion Russ Feingold" with "Pro-Life Tim Michels," Feingold's opponent, and asserting that "Tim Michels has pledged to allow the senate to vote on President Bush's judicial nominees," while "Russ Feingold has voted approximately 20 times since March 2003 to prevent a vote on President Bush's judicial nominees." FEC SJ Ex. 24 at 15.[14]

Thus, WRTL made substantial efforts to ensure that the filibuster controversy would be an important issue in the election, and its "issue ads" were part of a larger campaign with the dual—and related—aims of seeing WRTL's preferred judicial nominees confirmed and unseating Senator Feingold.

Second, WRTL's campaigning dovetailed with partisan efforts to make the filibusters a critical issue in the 2004 Wisconsin Senate race. The Wisconsin Republican Party and the three candidates seeking the Republican nomination—Tim Michels (the eventual nominee), Russ Darrow,

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[13] The next day, in an "E-Update" sent to its supporters, WRTL again stressed that "Feingold has voted to filibuster nominees 16 out of 16 times!" and asserted that its PAC would "vigorously support whichever of the 3" Republican candidates won the primary, in part because all three had "pledged to allow an up or down vote on the President's judicial nominees." JA 97-98.

[14] WRTL also devoted a substantial portion of the spring, summer, and fall editions of its quarterly magazine, *Life Without Limits*, to opposing Feingold's reelection and criticizing his position on the filibusters. JA 100-109; FEC SJ Ex. 24. For example, the cover story in the spring 2004 edition asserted that "Feingold has been active in his opposition to Bush's judicial nominees," noted approvingly that his Republican opponents would oppose filibusters, and concluded that "FEINGOLD MUST GO!" JA 100-103.

and Bob Welch—all invoked Feingold's participation in the filibusters as a central reason he should be defeated.

An article in *The Milwaukee Journal Sentinel* a year before the election, headlined "3 Seeking Feingold Seat Attack Him on Judges Issue," reported:

> In Wisconsin, the three Republicans vying to take on Senate Democrat Russ Feingold are attacking him on judges and assert the controversy resonates with voters. . . . "I think it will be a huge issue," said GOP Senate candidate Russ Darrow.

JA 71. The same article quoted Darrow as calling Feingold "a leader in the stonewalling effort" on judges, and saying, "I think it is the worst kind of politics. It's why many Americans want a new face." JA 74. Welch opined that the filibuster "was a dangerous precedent that would lead to a political backlash against Democrats." *Id.* Michels noted that the filibuster issue "is rising on people's radar screens." *Id.*

In the course of the campaign, all three Republican candidates attacked Senator Feingold on the filibuster issue. Michels issued a press release saying that Feingold's refusal to confirm President Bush's nominees was "his usual partisan game playing" and accusing him of continually "talking out of both sides of his mouth on this issue." Intervenors SJ Ex. 9. Darrow's campaign website identified the filibusters as an issue in the Senate race, and asserted, "The right Russ [i.e., Russ Darrow] will not hold judicial nominations hostage." Intervenors SJ Ex. 10. Welch issued a statement opining, "It's a shame that the persistent obstruction of the President's judicial nominees by Russ Feingold and his left-wing allies has forced President Bush to take the step of using a recess appointment," and called Feingold's position "back room partisan politics at its worst." Intervenors SJ Ex. 8.[15] At campaign rallies held in Wisconsin in September

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[15] Similarly, the Wisconsin Republican Party chairman told the press, "When people in this state understand where [Senator Feingold] is on things like the Patriot Act, *judicial nominees* and taxes, . . . you'll see numbers move." Intervenors SJ Ex. 12 (emphasis added). And a "poll"

and October of 2004, even Vice President Cheney raised the issue, claiming that "a good way to deal with the problem of the Democratic filibuster in the Senate is to elect some good Republicans like Tim Michels from Wisconsin." FEC SJ Ex. 19 at 4; FEC SJ Ex. 20 at 5.

Third, although WRTL's ads urge the audience to contact Senators Feingold and Kohl, they provide no contact information for them. Instead, they direct listeners to "BeFair.org," a website that WRTL maintained during the relevant time period in 2004. Visitors to BeFair.org would indeed find contact information for the Senators, but they would also find multiple press releases and "e-alerts" issued by WRTL excoriating Feingold and Kohl for their role in the filibusters—including the July 14, 2004 "e-alert" quoted above, which, in language very similar to the ads, chastised them for "putting politics into the court system, creating gridlock, and costing taxpayers money."[16] Accordingly, WRTL's purported "lobbying" ads directed their audience to contact information for Senator Feingold only through a website that harshly criticized him.

Fourth, the undisputed timing of WRTL's ads belies the notion that they were aimed solely (or even substantially) at affecting upcoming votes to end filibusters on judicial nominees, rather than the election. The Senate voted on motions to invoke cloture on four of President Bush's judicial nominees on July 20 and July 22, 2004. FEC SJ Ex. 35 at 4. The Senate recessed on July 22 and did not return until Septem-

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on the state party's website asked, "What is the #1 reason why Russ Feingold should be voted out of office in 2004?" and listed as one of the four possible responses, "His obstruction of President Bush's judicial nominees." FEC SJ Ex. 18 at 2.

[16] Although the BeFair.org website is no longer in operation, the archived home page of the site can be found at http://web.archive.org/web/20040729081130/http://www.befair.org/ (last visited Feb. 21, 2007). The archived page on which the quoted "e-alert" appeared can be found at http://web.archive.org/web/20050130114628/www.befair.org/pdf/e-alerts/7-14-04.pdf (last visited Feb. 21, 2007).

ber 7.[17] Yet, WRTL began running its radio ads on July 26 and its television ad on August 2—immediately *after* the Senate had recessed, when the ads were the least likely to affect filibuster votes, but most likely to have an impact on the upcoming election. FEC SJ Ex. 3 at 65. Following the 2004 election, WRTL never resumed running the ads—despite the fact that the filibuster controversy peaked in the spring of 2005, when other groups spent more than $8.5 million on advertising regarding the issue. FEC SJ Ex. 3 at 101-103; FEC SJ Ex. 1 at 29-30; FEC SJ Ex. 7 at 18, 26-27.[18]

The facts thus leave no doubt that WRTL's ads are precisely the kind of advertisements at which Section 203 was aimed: ads that address an "issue" by criticizing a particular candidate's stand on that issue just before an election. As *McConnell* recognized, such ads are "the functional equivalent of express advocacy." 540 U.S. at 206.[19]

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[17] *See* Days in Session Calendars, U.S. Senate, http://thomas.loc.gov/home/ds/s1082.html (last visited Feb. 21, 2007).

[18] Indeed, with the exception of a radio ad relating to the nomination of Justice Alito that ran for a brief period, WRTL never ran any broadcast ads related to the filibuster issue after the 2004 election. FEC SJ Ex. 3 at 102-103.

[19] Expert testimony confirmed that common-sense conclusion. For example, Douglas Bailey, an experienced political advertising consultant, explained that "[a] purported issue ad that airs in the time immediately preceding an election that implores a voter to 'contact' . . . a candidate about one's opposition to a certain policy will unavoidably affect that candidate's election. . . . [T]he implicit message to the voter is that one way to change the policy would be to remove that candidate from office on election day." JA 57. Bailey explained that WRTL's ads imply that Senator Feingold "supports the filibuster, and thinks that 'politics' are more important than saving courts from 'a state of emergency' or allowing qualified candidates to serve in the federal judiciary." *Id.* at 59. And he concluded that "[w]hen viewed in the context of the timeframe they were intended to air," WRTL's ads "undeniably would have influenced the election." *Id.* at 58-59.

B. WRTL Had Ample Alternative Means To Disseminate Its Message

Nor has WRTL shown that it faced undue burdens as a result of having to comply with BCRA's funding restrictions. Section 203 applies only to advertisements that are broadcast on radio or television; run in the final weeks before an election; clearly identify a particular candidate; and, in the case of a congressional election, are targeted to the candidate's electorate. 2 U.S.C. § 434(f)(3). Moreover, corporations and unions may run even ads that fit all of BCRA's criteria for electioneering communications so long as they do so through their PACs, rather than funding them with general treasury monies. *Id.* § 441b(b)(2). The burdens Section 203 imposes on corporations' First Amendment rights—far from being a "complete ban" on speech, *McConnell*, 540 U.S. at 204—are thus limited and tolerable in view of the compelling governmental interest at stake. Corporations may run whatever ads they please even during BCRA's specified preelection periods "by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." *Id.* at 206. Even if there may be exceptional circumstances in which the alternative means permitted by BCRA are not adequate, WRTL has made no such showing here.

1. *The PAC Option.* WRTL had a functioning PAC, which it had used to make independent expenditures against Feingold in 1992 and 1998. *See supra* note 12. WRTL contended below that it was unable to raise sufficient funds for its PAC in 2004 to finance the $100,000 it expected to spend on the ads. But WRTL offered no specific evidence to support that assertion. It is undisputed that in the 1999-2000 election cycle, WRTL raised over $150,000 for its PAC. FEC SJ Ex. 10 at 7. Had it raised the same amount in 2004, it would easily have been able to fund its ads. Although WRTL asserted vaguely that PAC fundraising was difficult, *see id.*, it provided no evidence showing why the four years following the 1999-2000 election cycle would have presented special obstacles. Indeed, funds donated to PACs nation-

wide increased by about 50% during that period. JA 43; FEC SJ Exs. 45, 46.

In any event, absent a showing (which WRTL has not made) that extraordinary administrative burdens prevented WRTL from obtaining the necessary PAC donations from its members, its failure to do so demonstrates not that the PAC requirement unconstitutionally burdens WRTL's speech, but merely that WRTL could successfully fund its ads only by acting as a conduit for business corporations. The PAC option gives corporations like WRTL a "constitutionally sufficient" means of financing electioneering communications. *McConnell*, 540 U.S. at 203-206, 209-211; *cf. Beaumont*, 539 U.S. at 163 (rejecting view that "the regulatory burdens on PACs . . . rendered a PAC unconstitutional as an advocacy corporation's sole avenue for making political contributions"). WRTL has shown nothing to justify a contrary conclusion.

2. *The* MCFL *Option.* As a non-profit advocacy group, WRTL could also have avoided BCRA's restrictions on electioneering communications by constituting itself as an *MCFL* organization. It chose not to do so. *MCFL* organizations are constitutionally exempt from BCRA's requirements in part because they do not accept contributions from business corporations or labor unions. Accordingly, they do not implicate Congress's compelling interest in combating the distorting effects on federal elections of massive infusions of corporate cash. *See MCFL*, 479 U.S. at 259-264. WRTL, by contrast, sought to have it both ways: highlighting its status as a not-for-profit advocacy group, while using funds obtained from business corporations to pay for its ads.

In 2004 WRTL raised over $315,000 from corporations for its general fund, and the "vast majority" of that amount was from business corporations. FEC SJ Ex. 3 at 147-151; FEC SJ Ex. 60. Indeed, between five and ten business corporations donated a total of more than $50,000 precisely in order to pay for the ads at issue here. FEC SJ Ex. 3 at 143-145. In short, this is a classic case of business corporations funneling unregulated monies to an advocacy group to pay for ads that will influence a federal election. *See, e.g.*,

McConnell, 540 U.S. at 128 (noting that issue "ads were attractive . . . precisely because they were beyond FECA's reach, enabling candidates and their parties to work closely with friendly interest groups" in preparing and airing them); *id.* at 129 ("[P]olitical parties and candidates used the availability of so-called issue ads to circumvent FECA's limitations, asking donors . . . to give money to nonprofit corporations to spend on 'issue' advocacy."). This case thus implicates the core purposes animating Section 203.

3. *Avoiding Candidate Names or the Pre-election Period.* Alternatively, WRTL could have omitted Senator Feingold's name from the ads without sacrificing its professed purpose of "issue advocacy." *See McConnell*, 540 U.S. at 696 (issue ads can be run consistently with BCRA "by simply avoiding any specific reference to federal candidates"). Although WRTL claimed below that it was important to mention Senators Feingold and Kohl by name so that the audience would contact them, the ads' failure to provide any contact information for Feingold and Kohl belies that assertion. Similarly, were issue advocacy truly WRTL's sole objective, it could have run its ads when the filibuster issue was most salient, prior to the cloture votes in July 2004 or when the issue became most heated, in the spring of 2005. Instead, WRTL chose to run its ads when Congress was in recess, at a time when no filibuster votes were imminent—but the election was.[20]

III. THE DISTRICT COURT WAS WRONG TO REFUSE TO CONSIDER THE CONTEXT OF THE ADVERTISEMENTS

The district court concluded that Section 203 could not constitutionally be applied to WRTL's ads only by shutting its eyes to the undisputed facts. The court manufactured a test that limits judicial inquiry to the "four corners" of an ad, refusing to look beyond the ad's literal words and images or

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[20] WRTL could also have used non-broadcast media to disseminate its message. Indeed, it had done just that prior to the statutory electioneering period, switching to broadcast media only as that period approached. FEC SJ Ex. 3 at 81-82, 89-92, 97-99, 103-112; JA 16.

to consider the context in which its audience would view or hear it. That "see-no-evil" approach[21] was based (1) on a fundamental misunderstanding of *McConnell* and (2) on the district court's misplaced fear that looking beyond the face of the ads would prove judicially unmanageable. It not only led the district court to reach the wrong result in this case, but threatens to open the floodgates to renewed evasion of BCRA's regulations.

A. The District Court's Approach Contravenes This Court's Holding In *McConnell*

The district court held that, in evaluating WRTL's challenge, it would "limit its consideration to language within the four corners" of the advertisements. JS App. 18a. Refusing to consider any other facts or context that might bear on the meaning, purpose, or possible electoral effect of an advertisement, the district court restricted its inquiry to five factors, asking whether, on its face, the ad in question:

> (1) describes a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of such scrutiny in the near future; (2) refers to the prior voting record or current position of the named candidate on the issue described; (3) exhorts the listener to do anything other than contact the candidate about the described issue; (4) promotes, attacks, supports or opposes the named candidate; and (5) refers to the upcoming election, candidacy, and/or political party of the candidate.

JS App. 18a.[22] The court indicated that it would also look at the images of the television ad "to evaluate whether they otherwise accomplish the prohibited result." *Id.*

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[21] The description is borrowed from Hasen, *Back on the Campaign Trail?*, Legal Times Online (Feb. 12, 2007), *available at* http://www.law.com/jsp/dc/PubArticleDC.jsp?id=1170756162220.

[22] While the district court did not further specify the manner in which it contemplated that these factors would be weighed against one another, it appears that an ad that describes a legislative issue as set out

Because WRTL's ads referred to a current issue before the Senate, and did not explicitly attack Senator Feingold or refer to his record (other than by reference to the "group of Senators" widely known to include Feingold), the district court concluded that they were "genuine issue ads" that WRTL must be permitted to fund with general treasury monies. *Id.* at 14a, 19a-20a, 24a. The court explained:

> The common denominator between express advocacy and its functional equivalent, as the Supreme Court defined it in *McConnell*, is the link between the words and images used in the ad and the fitness, or lack thereof, of the candidates for public office. Indeed, it is that very link which evinces, *on the face of the ad*, the intent to influence the election that the *McConnell* Court imposed as a critical requirement to functional equivalency. Conversely, it is the absence of that link that enables an issue ad to be fairly regarded as a genuine issue ad. More importantly, it is the absence of that link which obviates the likelihood of political corruption and public cynicism in government where the ad, *on its face*, is devoid of any language the purpose of which is advocacy either for or against a particular candidate for federal office.

Id. at 22a-23a (citing *McConnell* v. *FEC*, 251 F. Supp. 2d 176, 796 (D.D.C. 2003) (Leon, J.)) (emphases added).[23]

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in factor (1), but does not meet any of the criteria set out in factors (2) through (5), would be exempt from Section 203.

[23] This analysis is similar to the approach Judge Leon took in his opinion for the three-judge district court in *McConnell*. There, Judge Leon would have invalidated the primary definition of "electioneering communication" because of "the absence of a link between the advocacy of an issue and a candidate's fitness, or lack thereof, for election," but would have upheld a modified version of BCRA's backup definition turning on whether a communication "promotes or supports . . . or attacks or opposes a candidate." 251 F. Supp. 2d at 795, 801. This Court upheld BCRA's primary definition of "electioneering communication" and thus had no occasion to consider the backup definition. *McConnell*, 540 U.S. at 189-

This reasoning cannot be reconciled with *McConnell*. It misapprehends this Court's holding in two critical respects. First, it resurrects the flawed notion that BCRA may constitutionally be applied only to an ad that "on its face . . . advoca[tes] either for or against a particular candidate for federal office." JS App. 23a. *McConnell* made clear that ads need not expressly advocate a candidate's election or defeat, or expressly comment on a candidate's fitness for office, in order to function as election advocacy, and that "the presence or absence of magic words" is not the only basis for discerning electioneering speech. 540 U.S. at 193. Indeed, this Court explicitly recognized what the record in *McConnell* demonstrated: that indirection is often a more effective form of advocacy than blunt words of support or opposition. *See id.* at 193 & n.77 (quoting expert Douglas Bailey's statement that "[a]ll advertising professionals understand that the most effective advertising leads the viewer to his or her own conclusion without forcing it down [his or her] throat"). Far from "impos[ing] as a critical requirement" that "the face of the ad" evince its intent to influence an election, JS App. 22a, this Court held that no express language was required in order to render BCRA's application to an ad constitutional.

Second, the district court's analysis—and, indeed, WRTL's entire case—is built on the erroneous premise that advertisements can easily be separated, on their face, into two mutually exclusive categories: electioneering ads, on the one hand, and "genuine issue ads," on the other. As this Court has already recognized, however, "[w]hile the distinction" may "seem[] neat in theory," *McConnell*, 540 U.S. at 126, no such line can be drawn in practice. An advertisement may be a "genuine issue ad" in the sense that it advocates a position on a political issue in which the advertiser genuinely believes, and at the same time have the purpose

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194 & n.73. The test the district court adopted in this case revives both the "promote, support, attack or oppose" formulation and the notion that Congress may constitutionally regulate only ads with an express "link" to a candidate's fitness for election.

and effect of influencing the election of a candidate who has taken a position on that issue. As one former PAC chairperson quoted in *McConnell* put it, "It is foolish to believe there is any practical difference between issue advocacy and advocacy of a political candidate. What separates issue advocacy and political advocacy is a line in the sand drawn on a windy day." *Id.* at 126 n.16 (internal quotation marks and citation omitted). Moreover, "issue advocacy" warrants no greater protection under the First Amendment than does express electioneering. *See id.* at 205.

The constitutional question to be answered, therefore, is not whether a particular advertisement is a "genuine issue ad," but whether—"genuine issue ad" or not—the advertisement is the "functional equivalent of express advocacy." 540 U.S. at 206. To answer that question, as this Court has made clear, it is not enough to observe that, on its face, the ad does not expressly promote or attack a candidate. Rather, the court must consider how the ad is likely to *function* in practice—and that in turn requires that the court not blind itself to the context in which an ad is run. "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne* v. *Eisner*, 245 U.S. 418, 425 (1918) (Holmes, J.).[24]

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[24] This Court's doctrines in various First Amendment arenas recognize the importance of context in determining the permissibility of speech regulation: for example, incitement of illegal activity, *see, e.g., Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969) (state may "forbid or proscribe advocacy of the use of force or of law violation" where, *inter alia*, the speech is "likely to incite or produce such action"); fighting words, *see, e.g., Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572-573 (1942) (determining whether words "by their very utterance inflict injury or tend to incite an immediate breach of the peace" or have a "direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed") (internal quotation marks omitted); and speech in public fora, *see, e.g., Heffron* v. *International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981) (permitting reasonable "time, place, and manner restrictions" on speech in a public forum). *See also Brown* v. *Hartlage*, 456 U.S.

What is perhaps most troubling is that the district court's "four corners" approach would invite wholesale circumvention of the campaign-finance laws—the very problem Congress worked to overcome in BCRA. The district court's approach reopens the loophole BCRA was intended to close, permitting a return to a world in which advertisers can skirt congressional regulation simply by including a reference to a pending legislative issue and omitting express words of support for or opposition to a candidate. And that loophole would be open not only for non-profit corporations like WRTL, but for all for-profit corporations and labor unions.

Indeed, under the district court's test, corporations and unions are free to run ads immediately before elections, criticizing candidates for office in the harshest possible terms, so long as the criticism refers to the candidate only as a member of a group and not by name. One can easily imagine, for example, an ad run in the hotly contested 2006 Connecticut senatorial primary between Senator Joseph Lieberman and Ned Lamont—in which the prime issue was Senator Lieberman's support for the war in Iraq—by an organization supporting Lamont, attacking a "group of Senators" who supported the war and urging voters to contact Senator Lieberman to tell him to oppose the war. Similarly, supporters of Representative Bob Ney's opponent in the 2006 congressional primary—when Ney was under investigation for his association with disgraced lobbyist Jack Abramoff—might have run ads financed with corporate treasury funds attacking a "group of Congressmen" who "care more about the Washington lobbyists who are making them rich than about their constituents," and asking viewers

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45, 56-57 (1982) (examining expressed intention of the speaker and the context of the communication—not just text of speech—in determining whether an anti-bribery statute proscribing certain election-related speech was unconstitutional as applied to a candidate's promise to reduce his salary if elected); *Watts* v. *United States*, 394 U.S. 705, 706-708 (1969) (holding that statement "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.," when "[t]aken in context," was "political hyperbole" and not a true threat against the President).

to call Representative Ney and tell him to support ethics legislation.[25] The corporate funding of such ads would be permissible under the district court's test—despite their patent electioneering message. That result seriously undermines BCRA and cannot be squared with *McConnell*.

B. A Proper Contextual Inquiry Is Administrable

The district court refused to look beyond the "four corners" of WRTL's ads in part because it feared that doing so would render as-applied challenges judicially unmanageable. The court opined that inquiring into an advertisement's purpose and effect in order to determine whether it is the functional equivalent of express advocacy was "practically unacceptable" because it would entail developing a record under "expedited circumstances," and "theoretically unacceptable" because it would involve an unworkable inquiry into the advertiser's subjective intent. JS App. 16a-18a.

The district court's concern that looking beyond the four corners of the ads would be "practically unacceptable" is

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[25] To take another example, in the 1998 Senate race between John Edwards and Lauch Faircloth, the American Association of Health Plans ran the following ad:

> Worried about rising healthcare costs? Then look out for the trial lawyers. They want Congress to pass new liability laws that could overwhelm the system with expensive new healthcare lawsuits. Lawsuits that could make the trial lawyers richer. That could make healthcare unaffordable for millions. *Senator Lauch Faircloth is fighting to stop the trial lawyers['] new laws. Call him today and tell him to keep up his fight.* Because if trial lawyers win, working families lose.

McConnell, 251 F. Supp. 2d at 568 n.99 (Kollar-Kotelly, J.) (emphasis added). Given the well-known fact that John Edwards was a trial lawyer—a significant issue in the campaign, *see id.* at 568—this ad had an obvious electioneering message. Yet it could readily have been made to meet the district court's test without affecting that message, simply by modifying the italicized sentences so that they read, "Call Senator Lauch Faircloth today and tell him to fight to stop the trial lawyers." So worded, the ad would be immune from regulation under the district court's approach simply because it referred to "the trial lawyers," rather than identifying Edwards by name, and avoided expressly praising Faircloth.

unwarranted. As an initial matter, as discussed above, *see supra* Part II.A, the contextual inquiry needed to resolve this case was minimal: that the ads in question denounced a "group of Senators" of whom Senator Feingold was one—particularly in combination with the undisputed fact that WRTL had publicly opposed Senator Feingold's reelection in 2004—suffices to decide this case. Even if more evidence were required, however, the court's administrability concerns were overblown: this case demonstrates that compiling a sufficient record is no more onerous than in the typical case where a preliminary injunction is sought and must be resolved on an expedited basis.[26]

This Court has previously rejected such administrability concerns as a reason to create a categorical exemption from campaign-finance laws. In *Buckley*, for example, the Court declined to carve out such a blanket exemption to FECA's disclosure requirements for minor parties, and instead required such parties to make a case-by-case showing that the facts of their situation demonstrated a reasonable probability that disclosure would subject them to harassment. 424 U.S. at 72-74. The Court expressly rejected the argument that a blanket exemption was necessary "lest irreparable injury be done before the required evidence can be gathered." *Id.* at 72; *see also Brown* v. *Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 88 (1982) (applying *Buckley*'s "reasonable probability" test to as-applied challenge to Ohio disclosure statute).

The district court's "theoretical" concerns merely reflected its misapprehension of the proper constitutional inquiry. In *McConnell*, this Court recognized that Congress had carefully designed BCRA's definition of "electioneering

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[26] In this case, moreover, the record had already been fully developed and presented to the court. Yet the district court chose to ignore the record in front of it because of hypothetical concerns about the difficulties of developing a record in some future case. Whatever a future case might bring, there can be no justification for refusing to consider in *this* case the very facts the district court had previously suggested should defeat WRTL's challenge.

communication"—with its requirements that an ad must clearly identify a candidate, must be aired in the weeks before an election, and must be targeted to at least 50,000 persons in the candidate's state or district—so as to encompass ads that would almost certainly function as electioneering. That congressional judgment regarding the scope of the problem BCRA addressed is entitled to substantial deference. *See, e.g., NRWC*, 459 U.S. at 209-210. And this Court's own judgment confirms that BCRA's definition was well-crafted: as the Court observed after reviewing a voluminous record, "the vast majority" of ads that clearly identified a candidate for office and were aired in the weeks before the election—including the many "issue ads" in the record—were "the functional equivalent of express advocacy." *McConnell*, 540 U.S. at 206. "Far from establishing that BCRA's application to pure issue ads" that do not constitute electioneering "is substantial, . . . the record strongly supports the contrary conclusion." *Id.*

Against that background, a court considering an as-applied challenge should not lightly conclude that an ad that meets BCRA's definition nevertheless really has no electioneering significance. Rather, an as-applied challenge should succeed only if the plaintiff can show that the ad itself and the circumstances of its creation and airing demonstrate that there is no reasonable prospect the ad is likely to influence the election. *See, e.g., Buckley*, 424 U.S. at 74 (holding that minor parties must submit evidence showing "a reasonable probability" that compliance with disclosure requirements will lead to harassment in order to succeed in an as-applied challenge); *Brown* v. *Socialist Workers*, 459 U.S. at 88 (applying *Buckley*'s test).

In order to make out [illegible]-applied challenge, in other words, a plaintiff sh[illegible] be required to show that its ad is different in *kind*—not merely in *degree*—from the "issue ads" considered in *McConnell*, so that the compelling governmental interest in preventing corporate funds from influencing elections has no application. *See, e.g., Buckley*, 424 U.S. at 30 (in rejecting claim that contribution limit was too low to serve Congress's compelling interest, explaining

that "[s]uch distinctions in degree become [constitutionally] significant only when they can be said to amount to distinctions in kind"). In *MCFL*, for example, the plaintiff made such a showing. There, this Court recognized that "we should not second-guess a decision to sweep within a broad prohibition activities that differ in degree but not kind." 479 U.S. at 263. It held the restriction on independent expenditures unconstitutional as applied to MCFL "not [because] MCFL merely poses *less* of a threat of the danger that has prompted regulation," but because "it does not pose such a threat *at all*." *Id.* (emphasis added). The same principles should govern here, and should significantly narrow and simplify the task of deciding an as-applied challenge to Section 203.[27]

These same considerations indicate that the district court's focus on the difficulties of an inquiry into the advertiser's subjective intent was misplaced. As an initial matter, the compelling justification for Section 203 is the need to temper the "corrosive and distorting" influence of corporate cash on federal elections. *McConnell*, 540 U.S. at 205 (cita-

[27] There may well be advertisements that fall within BCRA's definition of "electioneering communication" that are truly different in kind from the type of advertising that prompted Congress to enact BCRA's restrictions and that Congress has a compelling interest in regulating. To take one example, if an automobile dealership which bears the name of its founder (*e.g.*, "Joe Smith Honda"), who is also a candidate, runs an advertisement for the dealership in the ordinary course of business that happens to fall within the statutory electioneering period, such an ad might be sufficiently far removed from the concerns underlying BCRA that it should not be barred by the statute. A similar result might be appropriate if, say, Representative Mike Oxley were to decide to run for election again, and a consulting company in the business of ensuring compliance with the Sarbanes-Oxley Act were to seek to run an advertisement in his district that mentions the name of the statute, or if a candidate's business empire, named after him or her, sponsors a fall charity event every year and wants to publicize it during an election year. Such ads might well be deemed to have no realistic connection with the election or the candidate's fitness for public office and thus might be different in kind from the "vast majority" of advertisements falling within the definition of "electioneering communications," which this Court concluded could constitutionally be regulated.

tion omitted). That justification is implicated by any ad whose objective characteristics and context indicate that it is likely to have a material effect on voters' choices—and thus to function as the equivalent of express advocacy, *see id.* at 206—regardless of the advertiser's subjective intent in airing it. Ultimately, the integrity of the electoral process does not turn on an advertiser's subjective state of mind, but on the inferences that can reasonably be drawn from its objective conduct.

In any event, the district court was mistaken in believing that discerning electioneering intent requires the court to "try[] to read [the] speaker's mind," JS App. 18a, or even that it requires "depos[ing] . . . the 'decision makers' of the organization," *id.* at 15a. Where, as here, the likely electioneering effect of an ad is patent, an electioneering purpose may readily be inferred. In *McConnell* itself, this Court recognized that "the vast majority of ads" in the record that would have fallen within Section 203's scope "clearly had [an electioneering] purpose," 540 U.S. at 206, without inquiring into the subjective state of mind of particular advertisers.

Indeed, the rule in many areas of the law is that a party intends the natural and probable consequences of his or her actions. *See, e.g.*, LaFave, *Substantive Criminal Law* § 14.2 (2d ed. 2003) ("It is commonly said in civil . . . cases . . . that one is presumed to intend the natural and probable consequences of his acts."); *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 485 (1940) ("[R]espondents must be taken to have intended the natural and probable consequences of their acts."); *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526, 570 n.22 (1973) (Marshall, J., concurring in part) ("[P]erhaps the oldest rule of evidence—that a man is presumed to intend the natural and probable consequences of his acts—is based on the common law's preference for objectively measurable data over subjective statements of opinion and intent."). Where the natural and probable result of an ad will be to influence voters' choices, an advertiser can safely be presumed to have intended that result. Here, as discussed above, WRTL's ads' denunciation of a "group of Senators" that included Feingold both demonstrated the

likelihood that the ads would affect voters' choices and justified an inference that they were intended to do so.[28]

In this case, moreover, the record is replete with additional objective evidence reflecting a manifest electioneering purpose: WRTL announced that one of its "top priorities" was to "send Feingold packing," distributed literature opposing him, and endorsed his opponents; it directly tied its public opposition to Senator Feingold's reelection to his position on the filibusters; and its ads referred their audience to a website that attacked Senator Feingold precisely for his position on the filibuster issue. *See supra* Part II.A. The undisputed facts thus establish that WRTL's ads had an electioneering purpose.[29]

In sum, the district court's decision to ignore the undisputed facts of record in this case was mistaken. And even a cursory examination of those facts makes clear that nothing materially distinguishes WRTL's ads from the issue ads that this Court in *McConnell* found were "the functional equivalent of express advocacy." 540 U.S. at 206.

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[28] That is true whether or not WRTL also had a sincere desire to stop the filibusters and see its preferred judicial nominees confirmed. That an ad may have the genuine purpose of influencing debate or legislation on a particular issue in no way suggests that it cannot also have an election-influencing purpose, or that it cannot function as election advocacy. As discussed above, *see supra* Part III.A, there is no bright-line distinction between "genuine issue ads" and electioneering. Indeed, it may be impossible to disentangle an advocacy group's desire to achieve a particular legislative goal from its desire to unseat an elected official who has opposed or thwarted that goal. Here, any genuine desire WRTL may have had to stop the filibusters cannot be disaggregated from its incontestable intent to defeat the Senator who participated in them. The two go hand in hand.

[29] Judge Roberts, in dissent, pointed to the record evidence suggesting that WRTL's ads had an electioneering purpose and effect, but believed that the case should not be resolved on summary judgment because there was a dispute as to WRTL's subjective intent in running the ads. JS App. 39a. For the reasons given above, that premise is incorrect: resolution of WRTL's challenge does not turn on WRTL's subjective state of mind, but on its objective conduct.

CONCLUSION

This Court should reverse the district court's judgment and remand for the entry of summary judgment in favor of appellants.

Respectfully submitted,

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